IN THE

Supreme Court of the United States

OCTOBER TERM 1978

NO. 78-1460

APPLE THEATER, INC.,
Petitioner,

v.

CITY OF SEATTLE,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

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COUNTERSTATEMENT

Apple Theater seeks to entice this Court to review the judgment of the Supreme Court of the State of Washington upholding the validity of certain City of Seattle zoning ordinances regulating the location of adult motion picture theaters by implying such ordinances have both a broader and more restrictive application than is demonstrated by the ordinances and appendices in its petition.

First, appellant would have this Court believe that confinement of adult motion picture theaters to three zones is "cluster" zoning, presumably to imply a very limited availability of suitable locations or to suggest that the market is somehow burdened. The Court should note that the area where such theaters are permitted uses is neither small nor particularly confined. Instead it is an area of mixed commercial and business uses and encompasses all of downtown Seattle, an area of approximately 250 acres; as the court below noted, adult theaters could easily find a location in the designated zones (App. A to Petition at A-9).

Secondly, appellant would have this Court believe the ordinances require "shuttering" or "termination" of businesses. The ordinances merely require termination of nonconforming theater uses in zones where such uses are not permitted within 90 days of the date the use becomes nonconforming. Appellant may continue to operate a motion picture theater at its existing location. Neither its lease nor its license restrict or confine its operation to adult motion picture fare.

By using such terms, appellant seeks to make this case something it is not. The federal questions presented by zoning laws distinguishing adult motion picture theaters from other theaters and regulating their locations for land use purposes have already been decided by this Court in Young v. American Mini Theaters, 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976). The instant case is in accord with that decision (and appellant has not argued that it is not) and with other applicable decisions of this Court.

Respondent submits that review should be denied because this case presents no new significant federal questions and because no vagueness exists in the ordinances or as applied to appellant.

ARGUMENT

1. No Significant New Federal Questions Are Presented By This Case

This Court in Young v. American Mini Theaters, supra, determined that a city may legitimately regulate the location of adult motion picture theaters in order to preserve and protect the

present and future character and quality of communities and urban life, and that a zoning regulation could classify and treat adult motion picture theaters differently from other theaters for such purposes without violating equal protection principles or First Amendment rights.

Appellant does not argue that the State Court's decision in the instant case is in conflict with or contrary to the Young decision. Instead, it argues that because the City's ordinances have confined instead of dispersed such uses and because they have not regulated other adult entertainment establishments at the same time (an underinclusive argument, presumably), such ordinances deny it equal protection. Respondent submits that such arguments present no new significant federal questions for the Court's determination.

A. Appellant's Equal Protection Rights Are Not Violated by Land Use Regulations Applying to All Adult Motion Picture Theaters But Not to Other Adult Entertainment Establishments Because the City May Legitimately Deal With Certain Land Use Problems Without Addressing Them All at One Time

The thrust of appellant's argument is that the City's zoning amendments are underinclusive and therefore deny it equal protection because such ordinances do not also regulate the location of other adult entertainment establishments.

Neither did the Detroit ordinance in Young, supra, regulate all adult entertainment establishments, although, admittedly, other amendments regulated more than adult theaters. For instance, Detroit's ordinance did not include massage parlors, "blue motels," burlesque houses, body painting studios, or nude wrestling studios. Nor did it include peep shows and panorams which Apple Theater is suggesting here should have been included. Young, f.n. 3, at 52.

This Court has long held that different classes may be treated differently. Barrett v. Indiana, 229 U.S. 26, 57 L. Ed. 1050 (1913). In a zoning context, this Court has previously held that legislative classifications must be allowed to control and that such classifications do not violate equal protection guarantees unless they are clearly arbitrary and unreasonable. Village of

Belle Terre v. Boraas, 416 U.S. 1, 39 L. Ed. 2d 797, 94 S. Ct. 1536 (1974); Euclid v. Ambler Realty, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (1926). Moreover, this Court has held that governmental regulations to resolve problems confronting the community may be resolved one by one without violating equal protection guarantees; a statute need not cure all evils perceived at the same time. City of New Orleans v. Dukes, 472 U.S. 297, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976); Katzenbach v. Morgan, 384 U.S. 641, 16 L. Ed. 2d 828, 86 S. Ct. 1717 (1966); McLaughlin v. Florida, 379 U.S. 184 at 191, 13 L. Ed. 2d 222, 22 S. Ct. 283 (1964).

B. A Determination to Confine and Not Disperse is a Legislative and Not a Judicial Decision and Has No Constitutional Significance

In Young, supra, the court expressly recognized legislative discretion in determining whether to confine or disperse adult theaters, noting that a municipality may legitimately do either, but that, in any event, the City's interest in preserving urban life was sufficiently important for such purposes. Young at 62, 70-73.

2. The Ordinance is Not Vague; However, Even If It Were As to Others, It is Not as to Appellant Because Appellant Admits it Shows Adult Films Exclusively

Appellant argues that Seattle's zoning ordinance is void for vagueness because it has not identified how many films of the type defined would create an adult theater use. It then argues that Detroit's ordinance was not so infirm because it included a quantitative term in the definition of adult book stores.

This case does not involve adult bookstores; it deals with adult motion picture theaters. The definition of such theaters in the Detroit ordinance is similar to the Seattle ordinance in this respect: neither identifies the number of films or materials later defined which must exist before the use exists. Arguably, inserting a quantitative term such as "significant" or "substantial" into the definition, as appellant seems to suggest, would create vagueness, not eliminate it, because such terms are relative and susceptible of multiple interpretations.

The use of the theater for the presentation of the defined films is what is addressed in both zoning ordinances to determine whether an adult motion picture theater use exists. If it does, then such uses are permitted only in certain locations. No uncertainty and vagueness exists in determining that use.

Appellant argues, however, that if the exhibition of a single film of the type defined creates an adult theater use, then the ordinance is constitutionally overbroad. Such an argument confuses the principles of vagueness and overbreadth. Unconstitutional vagueness exists when there is inadequate notice of proscribed conduct; whereas, overbreadth invalidates legislation which, while not vague, is unnecessarily broad because it proscribes or inhibits conduct protected by the First Amendment. Gooding v. Wilson, 405 U.S. 518, 31 L. Ed. 2d 408, 92 S. Ct. 1103 (1973); Young, supra.

A zoning regulation restricting adult theater uses to certain locations but which does not censor, restrict, or limit the showing of the films

themselves does not proscribe or inhibit conduct protected by the First Amendment; it remains neutral on the content of the films although it uses such content for the purposes of classification. Young, supra.

In any event, the hypothetical arguments advanced by appellant should not concern this Court because Apple Theater admits it shows films of the type defined in the ordinance exclusively. Whatever uncertainties exist with application of the ordinance to others do not exist with respect to Apple Theater and, because of this, as in Young, appellant has not been denied due process. See Young at 59-62.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent